Supreme Court, U.S.
FILED

04-475 SEP 1 - 2004

OFFICE OF THE CLERK

No. _____

IN THE

**SUPREME COURT OF THE UNITED STATES**

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GERARDO ALBURQUERQUE-RIVERA---- *Petitioner*

v.

JOHN ASHCROFT ATTORNEY GENERAL---
*Respondent*

---

On Petition For A Writ Of Certiorari To
United States Courts Of Appeal, Ninth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

A. DID THE NINTH CIRCUIT COURT OF APPEAL ERR IN DENYING PETITIONER'S MOTION TO REOPEN

LIST OF PARTIES

The party in this case is the United States Immigration and Naturalization Service.

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] is unpublished.

## JURISDICTION

[X] For cases from federal court

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 21, 2004, and a copy of the order denying rehearing appears at Appendix A.

The jurisdiction of this court is invoked under 28 U. S. C. Section 1254 (1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### STATUTES

United States Code
Section 1254 (a)
(1)..... 9

Immigration and Nationality Act
Section 244 (b) (2)..... 9

## STATEMENT OF THE CASE

Petitioner is a native and citizen of Mexico. He entered the United States without inspection on November 27, 1988. Petitioner was served with an Order To Show Cause on March 19, 1996. At this hearing the Petitioner admitted the factual allegations and requested relief in the form of Suspension of Deportation and voluntary departure. The Petitioner withdrew his request for political asylum.

On April 10, 2000, the Petitioner's case was heard on the merits. The Immigration Judge found that the Petitioner failed to establish that he had been residing continuously in the United States for the necessary period of seven years as required prior to the issuance of the charging documents. The Immigration Judge also found that the Petitioner failed to demonstrate hardship on both the part of himself or his child. The Petitioner then filed an appeal with the Board of Immigration Appeals.

On August 28, 2002, The Board of Immigration Appeals affirmed the decision of the Immigration Judge and denied the Petitioner's claim for hardship and found that he was not eligible for suspension of deportation.

On September 13, 2002, the Petitioner filed a Petition for Review with the Ninth Circuit Court of Appeals based on the decision of the Board of Immigration Appeals.

The Petitioner received notification that the Ninth Circuit Court of Appeals denied his Petition for Review on June 21, 2004.

Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control. The Chinese Exclusion Case, 130 U.S. 581 (1889), Fong Yue Ting v. United States, 149 U.S. 698, (1893), Knauff v. Shaughnessy, 338 U.S. 537 (1950).

However it is also clear that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to the traditional standards of fairness encompassed in due process of law. The Japanese Immigrant Case, 189 U.S. 186 (1903); Woo Yan Sung v. McGrath, 339 U.S. 33, (1950), Kwong Hai Chew v. Colding 344 U.S. 590, 598, (1953),

In Wong Yang Sung v. McGrath, 339 U.S. 33, (1950), it is stated that "Our law may, and does place more restrictions on the alien then the citizen. But basic fairness in hearing procedure does not vary with the status of the accused. If the procedures used to judge the alien are fair and just, no good reason can be give why they should not be extended to simplify the condemnation of the citizens. If they would be unfair to citizens, we cannot defend fairness of them when applied to the more helpless alien. This is at the root of our holdings that the alien must be given a fair hearing to test an official claim that he is one of a deportable class."

The court in Shaughnessy v. Mezei, 345 U.S. 206 (1953) further elaborated, "The most scrupulous observance of due process, including the right to know a charge, to be confronted with the accuser, to cross-examine witnesses, and to produce evidence in one's own behalf, is especially necessary. The court stated Both the old proceedings by which one may be bound to keep the

peace, and the newer systems are safeguarded with full rights to judicial hearings for the accused. On the contrary, the Nazi regime in Germany installed a system of "protective custody" by which the arrested could claim no judicial or other hearing process. As a result the country was filled with concentration camps and summary detentions and deportations. Such practices one established with the best of intentions, will drift into the oppression of the disadvantaged in this country as surely as it has elsewhere. Differences in the process of administration make all the difference between a reign of terror and one of law."

Herein the Petitioner seeks due process by asking for a stay of removal pending a review of the merits of his case, which to date have not yet been heard. Petitioner asserts that due process entitles him to a stay of deportation and a fair hearing on the issues of relief from deportation. Denial of a stay in this instance serves no equitable purpose and serves to punish the Petitioner for the error of the judge in not giving sufficient weight to the equities and hardships that he would face if he was deported to Mexico.

Stay requests such as those made by the Petitioner are presently evaluated under the same standards employed by district courts in evaluating motions for preliminary injunctive relief. Lopez v Heckler, 713 F. 2d 1432, 1435, 463 U.S. 1328 (1983). In Lopez it is stated that the petitioner must show either a probability of success on the merits and the possibility of irreparable injury, or that serious legal hardships are raised and the balance of hardships tips sharply in the petitioner's favor. These standards represent the outer extremes of the continuum, with the relative hardships to the parties providing the critical element in determining at what point

on the continuum a stay pending review is justified. Arthurs v. INS, 959 F 2d 142, 143-44 (9th Cir. 1992)

In the case of Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, (1988), the court held that an order by a federal court that relates only to the conduct or progress of litigation by the court ordinarily is not considered an injunction, and therefore is not appealable. However the Supreme Court went on to hold that it will continue to provide appellate jurisdiction over orders that grant or deny injunctions and orders that have the practical effect of granting or denying injunctions and have serious and perhaps irreparable consequences

Therefore based on the above decisions it is entirely proper for the court herein to review the denial of Petitioner's stay because there is a high probability that he can prevail on the merits of his claim. Petitioner can also demonstrate that he and his family will suffer irreparable harm if he is removed from the United States.

Prior to the enactment of the Illegal Immigration Reform Act. the filing of a petition for review automatically stayed a petitioner's deportation pending appellate review in most cases. This has been well stated in the case of De Leon v. INS, 115 F 3d 643, 644, (9th Cir. 1997).

The institution of IIRIRA, 1n 1996, brought immense change to the court's jurisdiction to review final deportation and exclusion orders. The new law established permanent rules that apply to removal proceedings that were initiated against aliens on or after April 1, 1997. As part of the changes made to the petition for review process, IIRIRA eliminated the automatic stay provisions and replaced it with provisions similar to the stay provisions applicable to aliens convicted of an aggravated

felony under the old INA. These changes were upheld in the case of Kalaw v. INS, 133 F 3d 1147, 1149 (9th Cir. 1997).

Although the old immigration law provided for an automatic stay when a petition was filed for review, some cases were considered exceptions. Under former INA Section 1252 (f) (2), stays were not automatic in the case of removal proceedings against convicted felons. In Arthurs v. INS, 959 F 2d 142, 143-44 (9th Cir. 1992), a case involving an aggravated felon, it was stated that aliens convicted of an "aggravated felony," within the definition of the INA, were not automatically entitled to a stay of deportation pending their appeal. For these aliens the court had the discretion to grant a request for a stay of deportation, after evaluating the stay request under the same standards that were applied in the district courts in evaluating a preliminary injunction.

During the evolution of the Immigration and Nationality Act, the case of Artukovoc v. Rison, 784 F 2d 1354, 1355, (9th Cir. 1986), added a further requirement that specified "that the petitioner is required to establish either a probability of success on the merits and the possibility of irreparable injury, or that serious legal questions are raised and the balance of the hardships tips sharply in petitioner's favor."

It has now been clearly established that 8 U.S.C. Section 1252 (f) (2) applies to the grant of a temporary stay for an alien once a decision of removal has been ordered. Maldonado v. Fasno, 67 F. Supp. 2d 1170, 1175. 1175 (S.D.Cal. 1999). Under Section 1252 (f) (2) it is stated that; " A final order for removal cannot be stayed "unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." The terms "clear and convincing," have

been held as an intermediate standard, not as high as that of proof "beyond a reasonable doubt," but higher than a "preponderance of evidence." United States v. Meza-Soria, 935 F. 2d. 166, 169, (9th Cir. 1991).

With respect to factual challenges, Section 1252 (f) (2) requires that the alien establish that the order or removal was "manifestly contrary to law." In Dickinson v. Zurko, 527 U.S. 150, 155 (1999), "manifest" was described as something that is apparent, obvious, clear, or undisputable

## REASONS FOR GRANTING THE WRIT

The United States Code Section 1254 (a) (1) provides that the Attorney General may suspend the deportation of an alien where such alien: "Is deportable under any law of the United States...; has been physically present in the United States for a continuous period of seven years immediately preceding the date of such application, and proves that during all of such period he was, and is, a person of good moral character; and is a person whose deportation would in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent or child, who is a citizen of the United States, or an alien lawfully admitted for permanent residence."

In the case at hand Petitioner has established seven continuous years of presence in the United States. Petitioner entered the United States on November 27, 1988, and was served with an Order To Show Cause on March 28, 1996. this period extends beyond seven years in compliance with INA Section 244 (b) (2). Since Petitioner never left the United States there was no break in his continuous physical presence.

The Immigration Judge failed to properly evaluate the Petitioner's supporting letters and affidavits to establish his period of residency. It should be taken under judicial notice that immigrants who first arrive in the United States do not immediately begin to collect documents in support of their residency here. Many of them are required to live with friends and relatives, and to work with assumed names and fraudulent social security numbers. Many of these individuals are paid only in cash and therefore are unable to produce records. More importantly the Immigration Judge failed to acknowledge and give weight to bank records from Bank of America that established that the Petitioner had been a customer of the bank since 1989. This is extremely important since the Petitioner needed only to establish his presence since the end of March 1989.

The Act also states that the person applying for relief must be of good moral character, both statutorily, and in the exercise of discretion. The Petitioner has never been arrested or convicted of a crime as evidenced by his own testimony and documentary evidence or record.

The Petitioner called attention to an error that was made in an initial application for political asylum. This application stated that the Petitioner had entered the United States in 1991. However, the Petitioner explained that this error was based on the fact that the individual who filled out this petition was not an attorney and also not versed in this language .

In Aguilera-Cota v. INS, 914 F. 2d 1375 the 9th Circuit reversed a judges adverse finding on credibility stating that," Applications are frequently filled out by poor illiterate people who do not speak English, and can not obtain counsel." Thus minor inconsistencies should not lead to negative determinations. of credibility. INS

Supplementary Guidelines reprinted in 67 Interpreter Releases 101-103 (Jan 22, 1990), "Minor inconsistencies, misrepresentations,, or concealment in a claim should not lead to a finding of incredibility where the inconsistency, misrepresentation, or concealment is not material to the claim.

After considering all of the evidence presented, the court found that the Petitioner was a person of good moral character as require by the Act.

The Immigration Judge also erred in finding that the Petitioner did not establish extreme hardship as required by the Act.

Many factors must be taken into consideration in making a determination of extreme hardship. All factual data and relevant facts presented must be completely analyzed.

"Failure to consider any of the facts presented constitutes an abuse of discretion" In making its determination the court should look at: "age of the subjects, family ties in the U.S. and abroad; length of residency in the U.S. conditions of health, conditions in the country to which the alien is returnable, economic, political, and financial status, business and occupation, the possibility of other means of adjustment, whether of special assistance to the U.S. or the community, and immigration history. "In making this determination, relevant factors though not determinative in themselves must be considered in the aggregate in determining whether extreme hardship exists." Salamenda v. INS, 70 F. 3d 447 (7th Cir. 1995).

Petitioner has lived in this country for a continuous period of at least twelve years, having entered this country

in 1988, at age 22. The case of Urbina-Osejo v. INS, 124 F. 3d 1314, 1318 (9th Cir. 1997), established that acculturation is also a factor in establishing hardship. The Petitioner has studied and learned he English language, and even started his own business outside of his regular employment. The Petitioner is a homeowner, and maintains a checking and savings account in this country. The Petitioner is also active in community activities and attends church here.

More importantly the Petitioner is the father of two children, and maintains a relationship with the mother of his two children who is waiting to adjust through her father who is a lawful permanent resident. All of these individuals reside with the Petitioner here in the United States. Separation from family and children may considered the most extreme form of hardship. Bastides v. Immigration and Naturalization Service. 609 F.2d 101 (1979), established that other factors must be considered in determining hardship. In that instance the court failed to recognize emotional hardship which would result from separation of the alien who expressed deep affection for his child, and who had been shown to have acted consistently with his expression of affection. Therein insufficient consideration was given to non-economic hardship which would result from the alien's deportation. Thus remand was required.

Historically the court has ruled that family and relationships between family members occupies a place of central importance in our nation's history and are a fundamental part of the values that underlie our society. Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977).

Additionally the court in Urbano de Malaluan v. Immigration and Naturalization Service, 577 F. 2d 589

(9th Cir. 1978), reversed an order of the Board of Immigration Appeals denying a motion to reopen proceedings, emphasizing that the "separation of the petitioner from members of her family who are United States citizens must be considered in conjunction with economic detriment in reaching the eligibility decision."

In Wang v. Immigration and Naturalization Service, 622 F.2d 1341 (1980), the court reasoned that the minor children of the Wangs , who have spent their whole lives in the United States, may suffer potential hardship if they were forced to leave this country. Accordingly the court held that the Board should not have summarily dismissed the Wang's claim of hardship to their children. It was held that the effect that the deportation of the parents would have on the Wang children should be determined only after a hearing.

In Ramirez-Gonzalea v. INS, 794F. 2d 491 (9th Cir 1986), and in Carnalla-Munoz v. INS. 627, F 2d 1004 (9th Cir. 1980), the court recognized that "the most important single hardship factor may be the separation of the alien from the family living in the United States. It was further held in Prapavat v. INS, 662F. 2d 561, 563 (9th Cir. 1981), that "family unity is always an important consideration."

The Petitioner and his family would suffer extreme hardship financially if he was forced to return to Mexico. The Petitioner would be separated from his children and his common-law wife, as his family would remain in the United States. The Petitioner would have no means to take care of them in Mexico.

The Petitioner has worked consistently since entering the United States, and is currently working for DDH as an inspector. He has also opened his own home business. This has allowed him to substantially increase

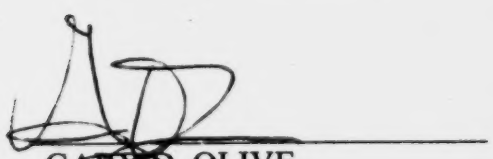
his earning potential. The Petitioner has also acquired seniority and benefits through his employment. All of these would be forfeited if he had to return to Mexico. The Petitioner has established that he has no ties in Mexico, and acquiring a job would be extremely difficult.

## CONCLUSION

Based upon the aforementioned, Petitioner respectfully requests that this Honorable Court grant their writ. Petitioner, through counsel, contends that the Ninth Circuit Court of Appeals erred in denying the Petitioner's Motion for Review and that this denial was manifestly contrary to law. Petitioner herein prays that the decision of the Ninth Circuit denying his Petition for Review be reversed, or in the alternative remanded.

Dated: August 1, 2004

Respectfully Submitted,



GARY D. OLIVE,
Attorney at Law

Jun 21 2004
CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GERARDO ALBURQUERQUE-RIVERA,

Petitioner,

v.

JOHN ASHCROFT, Attorney General,

Respondent.

No. 02-73-112Agency No. A74-430-449

MEMORANDUM

On Petition for Review of an Order of the Board of Immigration Appeals

Submitted June 14, 2004

Before: LEAVY, THOMAS AND FISHER, Circuit Judges

The court sua sponte changes the docket, pursuant to 8 U.S.C. Section 1252(b(3)(A) to reflect that John Ashcroft, Attorney General, is the proper respondent. The Clerk shall amend the docket to reflect the above caption.

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Respondent's motion for summary disposition is granted because the questions raised by this petition for review are so insubstantial as not to require further argument. See

United States v. Hooton, 693 F. 2d 857, 858 (9th Cir. 1982) (per curiam) (stating standard)

Pursuant to Elian v. Ashcroft, No. 02-72527, 2004 WL 1200790 (9th Cir. June 2, 2004) (order), petitioner's voluntary departure period will begin to run upon issuance of the court's mandate.

PETITION FOR REVIEW DENIED

APPENDIX A

**U.S. Department of Justice** **Decision of the Board of Immigration Appeals**
**Executive Office of Immigration Review**

Falls Church, Virginia 22041

Date: AUG 28 2002

File: A74-430-449 Los Angeles

In re: ALBUQUERQUE-RIVERA, GERARDO

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Frost, Jeremy R., Esquire

ORDER;

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. Section 3.1 (a) (7)

FURTHER ORDER: Pursuant to the Immigration Judge's Order and in accordance with our decision in *Matter of Chouliaris,* 16 I&N Dec. 168 (BIA1977), the alien is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director, and in the event of failure to depart, the alien shall be deported as provided in the Immigration Judge's order.

"s/_____"

FOR THE BOARD

APPENDIX B

8 U.S.C. Section 1254 (a) (1)

(a) Granting of status

(1) In general- In the case of an alien who is a national of a foreign state
Designated under subsection (B) (or in the case of an alien having no nationality, is a person who last habitually resided in such a designated state) and who meets the requirements of subsection (c), the Attorney General, in accordance with this section-

(A) May grant the alien temporary protected status in the United States and shall not remove the alien form the United States during the period which such status is in effect.

(b) Designations

(1) The Attorney General, after consultation with appropriate agencies of the Government may designate any foreign state (or any part of such foreign state) under this subsection only if-

(A) The Attorney General feels there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to that part of that state) would pose a serious threat to their personal safety.

APPENDIX C

INA Section 244 (b) (2)

"A brief, casual, and innocent departure from the U.S. that is not meaningfully disruptive does not break seven years continuous presence requirement."

APPENDIX D